A

EDGAR

v.

LAWLER BROS. (FIJI) LTD.

B

[SUPREME COURT, 1967 (Hammett J.), 6th December 1966, 13th February 1967]

Civil Jurisdiction

Master and servant—contract of employment—term entitling employee to written notice of dismissal—waiver of right by conduct—acceptance of oral dismissal. C
Contract—waiver—employee's entitlement to written notice of dismissal—conduct meriting dismissal—waiver by conduct of right to written notice.

The plaintiff was employed by the defendant company on terms which included a provision that written notice terminating the employment could be given by the employer for good cause. The plaintiff was guilty of conduct meriting dismissal and invited the manager of the defendant company to "sack" him. He was thereupon orally dismissed and thereafter brought a claim for damages for wrongful dismissal. D

Held: By his conduct the plaintiff had waived his right to notice of dismissal in writing and, having been guilty of conduct meriting dismissal, he could not succeed. E

Case referred to: *Latchford Premier Cinema, Limited v. Ennion* [1931] 2 Ch.409; 145 L.T.672.

Action for damages for wrongful dismissal.

K. Parshotam and B. C. Ramrakha for the plaintiff. F

G. M. G. Johnson for the defendant company.

The facts sufficiently appear from the judgment.

HAMMETT J.: [13th February 1967]— G

The Plaintiff's claim is for a total of £5,386/13/4 damages for wrongful dismissal.

It was claimed by the Plaintiff and admitted by the Defendant Company in the pleadings that on 29th February, 1966, a Contract of Service in writing was entered into between the Plaintiff and the Defendant Company. This Contract was referred to in the pleadings and its terms relied upon by both parties throughout the hearing of the action. It was not until I studied in detail the exhibits tendered in evidence at the trial that I became aware of two points which have apparently passed entirely unnoticed by both sides. H

The first of these points concerns the date of the Contract, namely 29th February, 1966. This is a fictitious date since in the year 1966 there were only 28 days in the month of February. There is no such date as 29th February, 1966.

The second point concerns the parties to the Contract. In paragraph 3 of the Statement of Claim it is stated that the Contract was made between the Plaintiff and the Defendant Company and this is certainly not contradicted but by implication at least admitted in paragraph 2 of the defence. Upon examining the Contract (Ex. A) however I find that it is stated in its opening words to be made between the Plaintiff and "Lawler Bros. Ltd. of Auckland" whereas the Defendant in the case is "Lawler Bros. (Fiji) Ltd". The Contract was, however, executed under the Common Seal of "Lawler Bros. (Fiji) Ltd".

In his Evidence in Chief the Plaintiff said that having entered into this agreement in Auckland he came to Fiji on 29th January, 1966, and began working for the Defendant Company on 1st February, 1966. He said he signed the agreement in Fiji on 29th February, 1966. His evidence was neither challenged in cross-examination nor contradicted by the witness for the Defence. In these circumstances, since both sides have adopted the terms of this agreement, I shall treat its fictitious date and its erroneous reference to "Lawler Bros. Ltd. of Auckland" as clerical errors which are of no material effect.

It is undisputed and I hold as fact, that the Plaintiff began to work in Fiji for the Defendant Company in February 1966 and that the terms of the Contract of Service between them were those set out in the Agreement dated 29th February, 1966, and admitted in evidence as Exhibit A.

It is the case for the Plaintiff that in Suva on the 25th April, 1966, Mr. M. J. Hurry, the Manager of the Defendant Company, summarily dismissed the Plaintiff, orally, in circumstances which amounted to a breach of the terms of the Agreement dated 29th February, 1966.

For the defence it is claimed that on the 25th April, 1966, the Plaintiff acted in breach of the terms of the Agreement by refusing to obey the directions of Mr. Hurry who thereupon dismissed him orally. It is submitted that the Defendant, by his conduct, waived the terms of the Agreement requiring notice in writing to effect a dismissal and termination of the Contract.

Under the terms of his employment the Plaintiff, who is a painter, was required to carry out the work of his employer, the Defendant Company, in his capacity as a painter and also to train other personnel in such duties. On the 25th April, 1966, the Plaintiff was working as a painter and in charge of other painters in doing painting work on premises at Flagstaff in the course of his duties for the Defendant Company. That morning he presented himself to Mr. Hurry, the Manager of the Defendant Company, at another work site where the Defendant Company was carrying out work, and complained to Mr. Hurry of pain in his foot. He sought permission to leave his work to see his doctor later that morning at 11.00 a.m. The Plaintiff says that Mr. Hurry refused to give him permission to see the doctor and told him to go back to his work site and continue with his work. The Plaintiff says he then told Mr. Hurry he

would do so and returned to the work site at Flagstaff. According to Mr. Hurry he did in fact tell the Plaintiff to get back to his job. Mr. Hurry said he did so because the Plaintiff had told him he had not yet been to the work site to start the other men on their work. Mr. Hurry says he told the Plaintiff he would see him when he himself came to the Plaintiff's place of work. At all events later that morning Mr. Hurry went to the Plaintiff's work site where the Plaintiff's duties were to do painting work and supervise and instruct other painters under him in this work.

It is not disputed that upon Mr. Hurry's arrival words were exchanged between him and the Plaintiff. According to the Plaintiff when Mr. Hurry arrived he told him that he, the Plaintiff, wanted to see a doctor because his foot was "just as bad". The Plaintiff said that Mr. Hurry told him he was not to see the doctor until he was given permission and the Plaintiff says that he thereupon told Mr. Hurry that he was going to see a doctor immediately. According to the Plaintiff, Mr. Hurry thereupon said "If that's the case you're fired", and ordered him off the premises. Under cross-examination the Plaintiff agreed that he was not doing any work on the arrival of Mr. Hurry at the work site because he said he was in agony with his foot. The Plaintiff was then asked —

Question: And then Mr. Hurry gave you a firm and clear instruction to get on with the work?

Answer : Yes, I recall that instruction.

Question: And you declined to follow that instruction?

Answer : I did.

According to Mr. Hurry he said he gave the Plaintiff instructions to get up on to some scaffold and show the two men who were there painting how to do their work properly. He said the Plaintiff flatly refused to get up there with the men and he repeated the order to him and told him that if he did not do it he would do something about it. Mr. Hurry said the Plaintiff thereupon replied "Sack me then, sack me." and came towards him in a menacing manner. He then told the Plaintiff to collect his gear and to "get off the job" and to come and pick up his air ticket to New Zealand and his wages the following day.

It is clear that at this interview on the 25th April, on the Plaintiff's own story, he was given clear and specific instructions to carry out certain duties within the terms of his employment and that he flatly refused to do so. The Plaintiff has given his reason for refusing to carry out instructions at the time as being that he was suffering from an injured or infected foot which was causing him pain. He maintains that by reason of his physical condition it was not reasonable that he should carry out the instructions given him.

I hold as fact that the Plaintiff was given a lawful order or instruction and that he refused to carry out such lawful order or instruction, given by the manager of the Defendant Company. The issue in this case is whether the Plaintiff's refusal to carry out this order amounted to misconduct which merited a summary dismissal or whether his refusal was justified in the circumstances having regard to his physical or medical condition.

The only evidence before me that the Plaintiff's foot was in fact in such a condition, or was occasioning him such pain, that it was not reasonable for him to carry out the otherwise reasonable and lawful instruction given him by his employer was that of the Plaintiff alone. The Plaintiff did not call any medical evidence to support his case although he said that later on the 25th April he was, in fact, examined by a medical practitioner. I cannot, however, disregard the Plaintiff's own evidence of what happened immediately after he was dismissed. In his evidence in chief the Plaintiff was asked what he did when he was dismissed and ordered to leave the place where he was working to which the Plaintiff replied "I got a taxi and I came straight down to the Labour Bureau."

Question : What happened then?

Answer : I saw a Mr. Chandler there and I stated to him my case of dismissal. As a result of what Mr. Chandler said I got into touch with the Immigration Department and I also got into touch with Mr. Ramrakha (his Solicitor).

Question : And what happened after that?

Answer : I went and saw the doctor.

It is clear therefore, from the evidence of the Plaintiff himself, that although he had been seeking permission of his employer as a matter of urgency to see a doctor about his foot, the urgency of doing so appears to have been relegated by him to second or third place after he was dismissed and when he had in fact left his work site. Having regard to the Plaintiff's own evidence on this issue and the total absence of any medical testimony I am not satisfied that the Plaintiff's contention that his physical condition was of such a nature as justified him to refuse to carry out an otherwise lawful and reasonable instruction or direction given him by Mr. Hurry, the manager of the Defendant Company. In these circumstances the Plaintiff's wilful refusal to carry out the lawful instruction of his employer was not justified and in my view amounted to misconduct of a gravity which merited his dismissal.

The remaining issue for determination is whether in the circumstances the oral dismissal of the Plaintiff by Mr. Hurry was sufficient to terminate the Contract of Employment having regard to Clause 10 thereof by which written notice should have been given. Clause 10 of the Agreement reads as follows :—

> "10. IN case the employee shall in any respect fail to observe or comply with the provisions and stipulations hereof or if he shall become bankrupt or shall make an assignment for his creditors or shall suffer execution of his goods or person the employer may without notice of payment in lieu thereof forthwith in writing determine the employment provided however that such notice shall not be given by the employer without good and valid reason."

It is the contention of the Defendant Company that the acceptance by the Plaintiff of his oral dismissal amounted to a waiver of his rights under the Agreement to require written notice.

In this connection the judgment of Bennett J. in *Latchford Premier Cinema Limited v. Ennion* [1931] 2 Ch. 409, is in point. In that case Plaintiff Company's Articles of Association provided that the office of a director should ipso facto be vacated if he should by notice in writing to

the Company resign his office. Two directors orally tendered their resignations at an annual general meeting of the Company and their resignations were accepted by the meeting and it was held that the resignations of the two directors were valid.

I appreciate the facts of that case are not on all fours with those of this case but in the course of his judgment Bennett J. said "I see no ground in law for saying that where a written contract has been made for service which requires a written notice on either side before it can be terminated it cannot be terminated by word of mouth by mutual agreement between the parties." I do, with respect agree with this view and I apply it to the circumstances in this case.

For these reasons I am of the view that the Defendant Company was entitled summarily to dismiss the Plaintiff for misconduct when he refused to carry out a reasonable order given on behalf of his employers, the Defendant Company, and that he has failed to show any proper cause justifying or excusing his refusal. Although he was entitled to notice of dismissal in writing, when he was dismissed orally, he accepted this oral dismissal and by so doing he waived his right to notice in writing.

The Plaintiff's salary under his Agreement amounted to £1,250 New Zealand per annum and it would appear therefore that his claim to £5,386/13/4 cannot be supported. He was, however, entitled to be paid any wages due to him up to the date of dismissal. There is some evidence before me that this has in fact been paid, not in cash, but by way of a return air passage to New Zealand which he has since converted into cash through the airline concerned.

I observe from the particulars of claim that there is no claim for special damages in respect of salary before the 26th April, 1966, and for this reason I must assume that the Plaintiff has conceded that he has received what was due to him up to that date.

For these reasons the claim is dismissed. There will be judgment for the Defendant Company with costs.

Action dismissed.